

BESSETTE, Steven M.
Appl. No. 10/765,093

Atty. Docket No. : 4380-150

REMARKS/ARGUMENTS

Claims 1 and 3-14 are pending. Solely in an effort to advance prosecution, claims 1, 3, 7 and 12 are amended to encompass infringing subject matter. No new matter has been introduced by the above amendments. Applicant does not acquiesce to the propriety of any of the Examiner's rejections and does not disclaim any subject matter to which Applicant is entitled. *Cf. Warner Jenkinson Co. v. Hilton-Davis Chem. Co.*, 41 U.S.P.Q.2d 1865 (U.S. 1997). Further, Applicant reserves the right to file continuing applications to cover disclosed subject matter not encompassed by the currently pending claims.

DOUBLE PATENTING REJECTION

The Office Action rejects claims 8, 9, 10, and 14 under the judicially created doctrine of double patenting over claims 1-9 of WO00/51436, which has issued as U.S. Patent No. 6,506,707 ("Bessette"). In particular, the Office Action asserts that the presently claimed methods, which require applying a composition containing thymol and clove oil, would have been obvious over the patented claims in Bessette, which discloses the application of a composition of thymol and eugenol. Applicant respectfully traverses this rejection.

Applicant respectfully submits that although clove oil contains eugenol, it is not equivalent to clove oil due to other constituents contained therein. See specification at page 4, paragraph [0024] to page 5, paragraph [0026]. The claims require a composition containing an active ingredient that consists of thymol and clove oil, and, insofar as clove oil includes other constituents not recited in the presently pending claims, clove oil should not be viewed as equivalent to eugenol. Accordingly, Applicant believes that a showing of unexpected or superior

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results is unnecessary at this time because the requisite *prima facie* case of obvious has not been established. Thus, Applicant respectfully requests reconsideration and withdrawal of this rejection.

REJECTION UNDER 35 U.S.C. § 103(a)

The Office Action rejects claims 1 and 3-14 under 35 U.S.C. § 103(a), as allegedly being unpatentable over Yu et al. (U.S. Patent No. 5,811,079), Tworowski (Journal Reference: "Herbicide Effects of Essential Oil," *Weed Science*, 50(4):425-431 (2002)) and Faust (www.bioag.com/fulvi-seedtreat.html). Applicant respectfully traverses this rejection.

Yu, alone or combined with Tworowski and Faust, does not disclose or suggest the features of the claimed invention. In particular, Yu does not disclose or suggest herbicidal compositions or methods of use wherein the herbicidally active ingredient consists of clove oil and either thymol, thyme oil, or methyl salicylate, with or without humic acid or fulvic acid, as presently claimed. Indeed, Yu relates to anticalculus dentifrice compositions, all of which include an "active" antimicrobial agent selected from the group consisting of thymol, eucalyptol, methyl salicylate, and mixtures thereof; a pyrophosphate ion; and an orally acceptable carrier (col. 3, lines 17-24). Yu also discloses that essential oils optionally may be included (col. 3, lines 50-54). As such, according to Yu, the "active ingredient" must comprise more than the active ingredients recited in the amended claims.

Tworowski merely teaches that essential oils may be useful as "'natural product herbicides' for organic farming systems" (p. 425). Although Tworowski does appear to show injury rates as a function of concentrations of essential oils and attempts to classify the "active

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ingredients" within essential oils that cause injury, it does not teach or suggest the combination of active ingredients and/or adjuvants recited in the claims.

Faust does not remedy the deficiencies of Yu and Tworkoski. To the contrary, Faust merely discloses the use of humic acid and fulvic acid for seed *treatment* and for spurring optimum levels of *growth and production*. Faust does not disclose herbicidally active compositions, nor does it teach or suggest using humic acid or fulvic acid with an herbicidally active composition. Accordingly, Applicant respectfully submits that one of ordinary skill in the art reading Yu alone or in combination with the teachings of Tworkoski and Faust would not have been motivated to reach the claimed invention.

Thus, for at least the above reasons, Applicant respectfully requests reconsideration and withdrawal of this rejection.

CONCLUSION

If anything further could be done to place the above-captioned patent application in better condition for allowance (i.e., via Examiner's Amendment), then please contact the undersigned attorney at the telephone number listed below.

Please grant any extension(s) of time deemed necessary for entry of this communication. The Commissioner is hereby authorized to charge any deficiency, or credit any overpayment, in the fee(s) filed, or asserted to be filed, or which should have been filed herewith (or with any paper filed hereafter) to Deposit Account No. 14-1140.

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Respectfully submitted,

NIXON & VANDERHYE P.C.

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CERTIFICATE OF FACSIMILE TRANSMISSION

I hereby certify that this document (including any paper referred to as being attached or enclosed) is being sent to the U.S. Patent and Trademark Office via facsimile transmission to (571) 273-8300 on the date indicated below, with a coversheet addressed to Commissioner for Patents, U.S. Patent and Trademark Office.

Date: July 10, 2006By: 

Willem F. Gadiano, Reg. No. 37,136